-164

FILE COPY

Supreme Court, U. S.
FILED
JUL 29 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-164

Haywood E. Honeycutt,

Petitioner

v.

State of North Carolina

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

Herbert H. Thorp
Rose, Thorp and Rand
200 Green Street
Fayetteville, North Carolina
Counsel for Petitioner

INDEX

	Page
Table of Citations	ii
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	5
Where Petitioner was twice tried on criminal charges, and successive juries disagreed on a verdict, though voting in substantial majorities for acquittal, declaration of a mistrial in the second trial, where there was at the time no manifest necessity for the mistrial, violated Petitioner's rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and the state cannot constitutionally subject him to a third trial.	5
Conclusion	17
Appendix	
Order of Superior Court of Cumberland County Denying Dismissal of Charges Against Petitioner	18
Order of Supreme Court of North Carolina Denying Petition for Writ of Certiorari	21

TABLE OF CITATIONS

	Page
CASES:	
Apodaca v. Oregon, 405 U.S. ___, 92 S. Ct. 1628 (1972)	14
Benton v. Maryland, 395 U.S. 784 (1969)	7
Carsey v. United States, 392 F.2d 810 (D. C. Cir. 1967)	14
Downum v. United States, 372 U.S. 734 (1963)	11,15, 16
Gori v. United States, 367 U.S. 364 (1961)	11
Green v. United States, 355 U.S. 184 (1957)	9,10, 12,13
Illinois v. Somerville, ___ U.S. ___, 92 S. Ct. 1247 (1972)	16

	Page
Johnson v. Louisiana, 405 U.S. ___, 92 S. Ct. 1620 (1972)	14
Preston v. Blackledge, 332 F. Supp. 681 (E. D. N.C.)	15
United States v. Jorn, 400 U.S. 470 (1971)	10,13, 15,16
United States v. Perez, 9 Wheat. 579 (1824)	6,7,3, 10,12, 14,15, 16,17
CONSTITUTIONAL PROVISIONS:	
Constitution of the United States, Amendment V	3
Constitution of the United States, Amendment XIV, Section 1	3
STATUTES:	
28 U.S.C. § 1257(3)	2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

Haywood E. Honeycutt,

Petitioner

v.

State of North Carolina

****

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

Petitioner, Haywood E. Honeycutt prays that a writ of certiorari issue to review the order made by the Criminal Session of Superior Court in Cumberland County, North Carolina, entered on March 29, 1972, denying dismissal of the case against Petitioner, which decision the Supreme Court of North Carolina refused to review by its denial of petition for writ of certiorari entered on May 2, 1972.

OPINIONS BELOW

The order of the Superior Court in Cumberland County, North Carolina, denying dismissal in this case is not reported. A copy of the order is appended to this petition. The Superior Court having directed, in an Order Granting Continuance entered on

March 29, 1972, that any appeal be taken directly to the Supreme Court of North Carolina, this case was not considered by the Court of Appeals of North Carolina. A petition for writ of certiorari to review this decision was denied by the Supreme Court of North Carolina without opinion. A copy of the order of that court denying the petition for writ of certiorari is appended to this petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina denying petition for writ of certiorari to review the judgment denying dismissal was made and entered on May 2, 1972. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3), petitioner having asserted in the court below rights, privileges and immunities conferred by the Constitution of the United States.

QUESTION PRESENTED

Where a first trial has been declared a mistrial for failure of jurors to agree, and a second mistrial is declared on the same ground, without the defendant's consent and before there is manifest necessity for the act, and where substantial majorities of both jurors vote for acquittal, is a third trial barred by the Double Jeopardy Clause of the Fifth Amendment

to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

> AMENDMENT V.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> AMENDMENT XIV
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

> or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This proceeding arises in the Superior Court of Cumberland County, North Carolina. Petitioner was indicted for murder in the first degree on August 11, 1969. He was tried for that offense on November 9, 1970, at which time the jury failed to reach a unanimous verdict, with ten of the twelve jurors voting for acquittal. The Presiding Judge ordered a mistrial. On January 4, 1971, Petitioner was tried again for the same offense. After the jury twice reported that it appeared to be deadlocked, the Presiding Judge declared a second mistrial. Defendant consented to neither mistrial.

The State calendared the case for a third trial to be held on April 4, 1972. On March 24, 1972, Petitioner moved the court to have the charge dismissed on the ground that a third trial violated his rights under the Double Jeopardy Clause of the Fifth

Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment. This motion was denied by the Presiding Judge on March 29, 1972 (R. 11), and Petitioner noted an appeal to the Supreme Court of North Carolina. (R. 13).

A motion for continuance pending the appeal was granted by the Presiding Judge on March 29, 1972. (R. 14). The order specified that appeal was to be directly to the Supreme Court of North Carolina.

A petition for writ of certiorari, on the ground of violation of Petitioner's rights under the Double Jeopardy Clause, was filed in the Supreme Court of North Carolina on April 11, 1972. (R. 1 et seq.). That petition was denied by an order of the Supreme Court of North Carolina entered on May 2, 1972. The rules of that court prohibit the filing of petitions to rehear in criminal cases.

REASONS FOR GRANTING THE WRIT

Where Petitioner was twice tried on criminal charges, and successive juries disagreed on a verdict, though voting in substantial majorities for acquittal, declaration of a mistrial in the second trial, where there was at the time no manifest necessity for the mistrial, violated Petitioner's rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and the state

cannot constitutionally subject him to a third trial.

This case involves the important rights of a defendant in a criminal case, under the Double Jeopardy Clause of the Fifth Amendment, not to be subjected to repeated prosecution after a mistrial has been declared unnecessarily. It presents to this Court a defendant who faces a third trial on felony charges after enduring two mistrials, at least one of which was detrimental to his rights and interests. The Supreme Court of North Carolina, in refusing to grant a writ of certiorari in this case, let stand a decision of a North Carolina trial court which had decided a federal question of substance not heretofore determined by this Court, which decision probably was not in accord with the applicable decisions of this Court. This Court, by granting certiorari in this case, could avail itself of the opportunity to give needed clarification to the content and meaning of the Double Jeopardy Clause for the benefit of state and lower federal courts, in the context of a case which is unclouded by extraneous issues.

In United States v. Perez, 9 Wheat. 579 (1824), this Court announced the basic principles to be used by courts which must apply the Double Jeopardy Clause where a mistrial is or may be involved:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .

9 Wheat. at 580. In Benton v. Maryland, 395 U.S. 784 (1960), it was held that the prohibition found in the Double Jeopardy Clause applies to the states through the Fourteenth Amendment. Whether Petitioner's rights are violated by a third prosecution after two juries have been discharged for failure to reach a verdict is thus a federal constitutional question.

Perez held, and it has since been the rule, that one mistrial and subsequent reprosecution because a first

jury could not agree on a verdict is not, without more, a violation of a defendant's rights under the Clause. However, Perez did not speak explicitly to subsequent mistrials, and it certainly did not hold that the state's right to reprosecute after a jury fails to agree cannot be abused. The state cannot, merely by citing Perez, endure as many reprosecutions as it wishes, and thus diminish the endurance, financial resources and chances for acquittal of an accused. Rather, the Court made it clear in Perez that its guidelines for mistrial, including "manifest necessity," apply "in all cases of this nature." Id., 9 Wheat. at 580.

Clearly, therefore, judicial discretion is limited where juries appear to be deadlocked just as elsewhere. Where the character of a case makes a verdict difficult, as in the instant situation, this Court's interpretation of the Clause probably requires that after some point the state not be allowed to continue its series of reprosecutions. Where that point is reached is not made clear by the decisions of this Court. Petitioner will argue, if a writ is granted, that it has been reached in the instant case.

This Court in its recent decisions has adhered to the view that, where mistrials are involved, "the public's interest in fair trials

designed to end in just judgments" must be weighed in the circumstances of each case against "a defendant's valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949). Judicial discretion notwithstanding, it is to be remembered that

> the constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.

Green v. United States, 355 U.S. 184, 187 (1957).

The Court in Green, supra, explained that

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.

Id., 355 U.S. at 187-88. Green suggested, and subsequent cases have held,

e.g., United States v. Jorn, 400 U.S. 470 (1971), that there are situations in which the discretion allowed by Perez can be abused, and in which the public's interest in assuring conviction of the guilty is outweighed by the rights of the accused.

In Jorn, supra, this Court held that the scope of permissible judicial discretion was exceeded and reprosecution was barred where a new trial was declared because a prosecutor had commenced trial without having his key witness present. From a viewpoint which leads to protecting a defendant's rights, there is little difference between a mistrial in that situation and a mistrial where all of the evidence available has left two successive juries in disagreement. The quoted language of Green, supra, certainly speaks as well to situations such as Petitioner's as it does to cases such as Jorn. Perez clearly requires that there be "manifest necessity" for declaration of a mistrial in situations such as Petitioner's just as in other cases.

Thus, although this Court has not reached the question in past decisions, the protection of the Clause must extend at some point to one accused who has endured successive jury deadlocks. At that point, the case comes within that class of cases,

> in which the defendant would be harrassed by successive,

> oppressive prosecutions, or in which a judge exercises his authority to help the prosecution.

Gori v. United States, 367 U.S. 364, 369 (1961). The Court has indicated that in this class of cases, a mistrial and re-prosecution will, in general, violate the rights of an accused under the Clause. Downum v. United States, 372 U.S. 734, 736 (1963). Petitioner will argue that the instant case is within this category.

The evidence was in sharp conflict at Petitioner's first trial, and a mistrial was declared when the jury appeared deadlocked with ten jurors convinced of his innocence. (R. 12). The case was tried a second time before a judge who was cognizant of the previous mistrial and the fact that ten jurors had stood for acquittal. The second jury, after some deliberation, reported that it had not reached a verdict, and was sent back to try again. When it returned a second time with no verdict, and with nine of the twelve convinced of Petitioner's innocence (R. 12), the court declined to send them out again. Instead, it declared a second mistrial without Petitioner's consent.

Where a jury was known to be voting heavily in Petitioner's favor, protection of his rights and interests demanded that the jury continue to deliberate until the deadlock was broken or no reasonable possibility of a verdict remained. In the context of

a second trial, where it was known in advance that the case was a difficult one, the "manifest necessity" required by Perez was not present where the jury had deliberated for a day or less. (R. 12). Rather, sound judicial discretion required that the jury be kept in deliberation until the absence of any possibility of agreement was manifest to the court and not merely a matter of the foreman's opinion. (R. 8).

The court knew, at the second trial,

> when I sent the case to the jury, that it was going to be a difficult case to decide.

(R. 8). The court also recognized that the quantity and quality of the state's evidence had not improved after the first trial. (R. 12-13). Therefore, because the defendant's interest in having the jury reach a verdict at this second trial was much greater than at the first, the court should have taken measures to avoid

> subjecting [Petitioner] to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .

Green v. United States, supra, 355 U.S. at 187, before allowing a second mistrial.

If the state is allowed to continue reprosecuting indefinitely, who can say how many deadlocked juries it will be willing to endure? If, at a third or fourth trial, the majority is lowered from the initial ten down to seven or eight, will the state not be tempted to continue the process? The redocketing of a third trial, stayed pending these proceedings, demonstrates the state's intention to continue.

It matters not that the trial court in declaring the second mistrial might not have intended to help the state by so doing. As this Court pointed out in Jorn:

> Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action.

400 U.S. at 483.

In addition, the second mistrial enhances the possibility that Petitioner, even though innocent, may be found guilty. Green v. United States, supra, 355 U.S. at 188. It is often noted at retrials that the testimony of prosecution witnesses changes perceptibly in anticipation of the already-known line of cross-examination. Favorable references to the defendant

are often changed or dropped. See, e.g., Carsey v. United States, 392 F.2d 810, 813 (D.C. Cir. 1967) (Levanthal, J, concurring). Petitioner will show, if review is granted, that such shifts occurred between his first and second trials. He will argue that more shifts favorable to the state could be expected at a third trial, and that the chances of conviction would thereby be increased.

Petitioner also points out the decisions of this Court last term in Johnson v. Louisiana, 405 U.S. ___, 92 S. Ct. 1620 (1972), and Apodaca v. Oregon, 405 U.S. ___, 92 S. Ct. 1628 (1972). While Petitioner makes no claim that the holdings in those cases control in the instant case, he does contend that the views therein expressed concerning "the function served by the jury in contemporary society," Apodaca v. Oregon, supra, 92 S. Ct. at 1632, suggest that importance is to be attached here to the fact that in each trial substantial majorities of the jurors voted for acquittal.

Petitioner does not contend that a single mistrial and reprosecution violated his rights under the Double Jeopardy Clause. Perez and the cases following it clearly hold otherwise. Petitioner does argue that the state does not have carte blanche under Perez to reprosecute him as many times as there are deadlocked juries. He argues that the Perez rule should be

clarified to this extent, and he contends that recent, related decisions of this Court, e.g., United States v. Jorn, supra; Downum v. United States, supra, point the way toward a holding that his rights under the Clause have been violated.

Preston v. Blackledge, 332 F. Supp. 681 (E.D. N.C. 1971), supports this position. There the district court held that the State of North Carolina could not, under Perez, prosecute an accused a fifth time after four deadlocked juries. The court said:

> While this court is aware of the need for the proper administration of justice and recognizes and agrees with the principles set forth in Perez that there can be a retrial of an accused after a jury has failed to reach a verdict, it does not support the Perez principle to the point at which it has been expounded in this particular instance. There is no doubt that such a practice is oppressive, that it creates undue anxiety and insecurity, and that it enhances the possibility that an innocent man may be found guilty. Furthermore, this court feels that to try the

> petitioners five times is far beyond the allowed exceptions set forth in Perez, and also exceeds the limitations on the right to retry an accused subsequently set forth by our Supreme Court.

332 F. Supp. at 687-88.

A grant of certiorari in the instant case would be consistent with the prior practice of the Court when dealing with this area of the law. The Court has said that it will not channel the judicial discretion allowed by Perez "according to rules based on categories of circumstances." United States v. Jorn, supra, 400 U.S. at 485. However, it frequently has provided guidance to the courts in the course of deciding whether, in specific instances, the declaration of a mistrial and the reprosecution of an accused exceeded the bounds of that "sound judicial discretion" allowed by the requirement of "manifest necessity for the act." United States v. Perez, supra, 9 Wheat. at 580. See, e.g., Downum v. United States, supra, 372 U.S. 734 (1963); United States v. Jorn, supra, 400 U.S. 470 (1971). Last term, the Court granted certiorari in Illinois v. Somerville, ___ U.S. ___, 92 S. Ct. 1247, 40 U.S.L.W. 3455 (1972), to determine whether, after Jorn, a defendant may be tried after the state has obtained a mistrial because of an insufficient indictment.

By reviewing the instant case, the Court could, in the course of its decision, clarify the holding of Perez. In so doing, the Court would provide guidance for courts which must deal with difficult cases which result in successive mistrials because of deadlocked juries. The Court thus would add to the content and meaning of the protection afforded accused persons by the Double Jeopardy Clause of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

APPENDIX TO PETITION

[NORTH CAROLINA]

[IN THE SUPERIOR COURT FOR CUMBERLAND COUNTY, CRIMINAL SESSION]

[STATE OF NORTH CAROLINA)
)
v.)
)
Haywood E. Honeycutt])

This matter coming on to be heard and being heard before the Honorable Edward B. Clark, Judge Presiding, 27 March 1972 Criminal Session Superior Court for Cumberland County, North Carolina, and being heard upon the written Motion for Dismissal filed by Herbert H. Thorp, Attorney for the defendant, a copy of said Motion and supporting Affidavit being attached herewith to this Order, and the Court finds as a fact the following:

1. The defendant was charged on or about July 30, 1969, with the capital offense of murder.

2. The defendant was granted bail on 31 July, 1969.

3. The defendant was tried for murder in the first degree at the 9 November 1970 Criminal Session of Superior Court in Cumberland County,

North Carolina, and after a lengthy and exhausting trial and many hours of deliberation by the jury, a mistrial without the consent of the defendant was ordered by the Presiding Judge. At the time of said mistrial, the jury was divided 10 to 2, and the 10 were in favor of a verdict of not guilty.

4. At the January 4, 1971 Criminal Session of Superior Court for Cumberland County, North Carolina, defendant was tried again for first degree murder, and after another lengthy trial and exhaustive deliberation by the jury, a mistrial without consent of the defendant was ordered by the Presiding Judge. The jury deliberated an afternoon, in evening session until 11 o'clock, P.M. and the following morning until approximately 12 o'clock, Noon. At the time of the mistrial, the jury was divided 9 to 3, and the 9 were in favor of a verdict of not guilty.

5. The State recalendared the case for trial for the week of September 28, 1971 and at the defendant's request, the case was continued until after November 15, 1971 to give the defendant an opportunity to complete his farming operation. The case was then continued for the term.

6. The State has elected to try the defendant for murder in the first

degree the third time and the case is set for trial during this Session on Tuesday, April 4, 1972.

7. The State has failed to demonstrate to the Court any change in the quantity and quantum of the State's evidence since the other two trials, and the posture of the defendant's evidence, according to counsel for the defendant, is the same.

8. The defendant, through counsel, has moved that this case be dismissed on the grounds of double jeopardy, asserting that the trial of this defendant for his life for the third time is oppressive, and it creates undue anxiety and insecurity and it enhances the possibility that an innocent man may be found guilty; and that this plea of double jeopardy should be treated as a plea in bar.

The Court, after having considered the arguments of counsel for the defendant and counsel for the State and examined briefs submitted by each, concludes as a matter of law that the trial of this defendant for his life for the third time does not constitue double jeopardy and the Motion to Dismiss is denied.

This the 29th day of March, 1972.

s/EDWARD B. CLARK
Judge Presiding
27 March 1972 Criminal Session
Superior Court for Cumberland
County, North Carolina

[IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA]

State of North Carolina

v.

Haywood E. Honeycutt

PETITION FOR WRIT OF CERTIORARI TO SUPERIOR COURT DENIED

[Stamp:]
Denied by order
of the Court in
Conference this
this the 2nd day
of May, 1972.

INDEX

OPINION BELOW 1

JURISDICTION 2

QUESTIONS 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 4

CONCLUSION 9

TABLE OF CASES

Benton v. Maryland, 395 U.S. 784 (1969) 6

Boyle v. Landry, 401 U.S. 77 (1971) 5

Brock v. North Carolina, 344 U.S. 424 (1953) 7

Burris v. Ryan, 397 F. 2d 553 (1968) 7

Downum v. United States, 372 U.S. 734 (1963) 7

Golubin v. United States, 393 F. 2d 590 (1968) 7

Gori v. United States, 367 U.S. 364 (1961) 7

Grogan v. United States, 394 F. 2d 287 (1967) 7

Hernandez v. Nelson,
293 F. Supp. 682 (1968) 7

Howard v. United States,
372 F. 2d 294 (1967) 7

Morgan v. State,
28 Ariz. 363, 236 P. 112 (1925) 7

Oelke v. United States,
389 F. 2d 668 (1967) 7

People v. Bishop,
238 N.Y.S. 2d 107, 38 Misc. 2d
106 (1962) 7

State v. Battle,
267 N.C. 513 (1966) 7

State v. Brock,
234 N.C. 390 (1951) 7

State v. Dove,
222 N.C. 162 (1942) 7

State v. Guice,
201 N.C. 761 (1931) 7

State v. Pfeifer,
256 N.C. 790 (1966) 7

State v. Weaver,
35 N.C. 203 (1851) 7

State v. Woodring,
95 Ariz. 84, 386 P. 2d 851 (1963) 7

Thompson v. United States,
155 U.S. 271 7

United States v. Perez,
22 U.S. (9 Wheat.) 256 (1824) 6

United States v. Perisco,
425 F. 2d 1375 (1970) 8

United States v. Reeves,
293 F. Supp. 213 (1968) 7

Wade v. Hunter,
336 U.S. 684 (1949) 6, 7

Younger v. Harris,
401 U.S. 37 (1971) 4, 5

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1972

No. 72-164

HAYWOOD E. HONEYCUTT,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The petitioner filed a Motion to Dismiss the charge pending against him in the Superior Court Division, General Court of Justice, Cumberland County, North Carolina, which was denied in an Order entered March 29, 1972, by the Honorable Edward B. Clark, Judge Presiding. Petitioner then filed a petition for writ of certiorari in the Supreme Court of North Carolina which was denied by Order of the Court in conference on May 2, 1972 (No. 66PC, Spring 1972). Copies of the above Orders are appended to the petitioner's petition before this Court.

From the judgment below, petitioner has filed this Petition for a Writ of Certiorari to the Supreme Court of North Carolina in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS

I.

WHETHER THE ISSUE SOUGHT TO BE RAISED IS PROPER FOR CONSIDERATION BY THIS COURT?

II.

WHEN THE DEFENDANT'S FIRST TWO TRIALS HAVE BEEN DECLARED MISTRIALS FOR FAILURE OF THE JURORS TO REACH A VERDICT, IS A THIRD TRIAL BARRED BY VIRTUE OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV.

§ 1. All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The following proceedings arose in the Superior Court of Cumberland County, North Carolina. The petitioner was charged on July 30, 1969, with the capital offense of murder, and was granted bail on July 31, 1969. Honeycutt was indicted for murder in the first degree on August 11, 1969. He was tried for that offense at the November 9, 1970 Criminal Session of Cumberland County Superior Court, and when the jury was unable to reach a unanimous verdict after lengthy deliberation, a mistrial was ordered by the presiding judge.

At the January 4, 1971 Criminal Session of Cumberland County Superior Court, the petitioner was tried again for first degree murder. After another lengthy trial and exhaustive deliberation by the jury, a mistrial was ordered by the presiding judge after the jury was unable to reach a verdict. As found by the court below, "(t)he jury deliberated an afternoon, in evening session until 11 o'clock, p.m. and the following morning until approximately 12 o'clock, Noon."

The State of North Carolina recalendared the case for trial for the week of September 28, 1971, and at the petitioner's request, the case was continued until after November 15, 1971, to provide him an opportunity to complete his farming operation. The State then calendared the case for a third trial to be held on April 4, 1972. On March 24, 1972, petitioner moved the court to have the charge dismissed on the ground that a third trial violated his rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment. This motion was denied by the Honorable Edward B. Clark, Judge Presiding, by Order entered March 29, 1972. A motion for continuance pending appellate review was

granted by the presiding judge on March 29, 1972, the Order specifying that review was to be directed to the Supreme Court of North Carolina.

A petition for writ of certiorari was filed in the Supreme Court of North Carolina on April 11, 1972, contending that the petitioner's rights had been violated under the Double Jeopardy Clause. The petition for writ of certiorari was denied by Order of the Supreme Court of North Carolina in conference on May 2, 1972.

From the Order of the Supreme Court of North Carolina denying relief, the petitioner now seeks the issuance of the writ of certiorari by the Supreme Court of the United States.

ARGUMENT

I.

THE ISSUE SOUGHT TO BE RAISED IS NOT PROPER FOR CONSIDERATION BY THIS COURT.

The petitioner entered a motion to dismiss the charge against him in the Superior Court of Cumberland County which he requested be treated as a plea in bar. Upon denial of relief, petitioner obtained a continuance pending appellate review by the Supreme Court of North Carolina. The petitioner is in effect now requesting this Court to enjoin the courts of the State of North Carolina from bringing him to trial upon this charge of murder in the first degree.

In the recent case of *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court handed down guidelines regarding intervention by federal courts in state criminal prosecutions. "What the concept (federalism) does represent is a system in which there is sensitivity to the legitimate interest of both State and National Governments, and in which the National Government, anxious though it may be to vendicate and protect federal rights and federal interest, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." 401 U.S., at 44-45.

Enjoining the State from prosecuting the petitioner upon the charge against him would contravene the philosophy of this Court's opinion in *Younger*. "(T)he normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such . . . allegations as those relied upon here." *Boyle v. Landry*, 401 U.S. 77, 81 (1971).

The petitioner is being placed on trial for a third time upon the charge of murder in the first degree after two previous juries had been unable to reach a verdict. To predict the outcome of this third trial would be mere speculation. The case might be dismissed upon some technicality or the jury return a verdict of not guilty, which would eliminate the necessity of presenting this alleged claim of constitution deprivation to the federal courts. If the defendant were convicted by the jury, the double jeopardy issue could be presented upon appeal. The normal course of this State's criminal prosecution should not be blocked in the present case.

The Respondent contends that the petitioner has failed to show any threat to his federally protected rights which cannot be eliminated by his defense against the criminal prosecution, or that he has shown irreparable injury that is both great and immediate. Therefore, the Respondent contends that this Court should refrain from enjoining the State of North Carolina from prosecuting the petitioner upon the charge against him.

II.

IF A DEFENDANT'S FIRST TWO TRIALS HAVE BEEN DECLARED MISTRIALS FOR FAILURE OF THE JURORS TO REACH A VERDICT, A THIRD TRIAL IS NOT BARRED BY VIRTUE OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

The Double Jeopardy Clause in the Fifth Amendment of the Constitution which reads " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," has been held applicable to the states through the Fourteenth

Amendment, *Benton v. Maryland*, 395 U.S. 784 (1969). From an early date the Supreme Court of the United States has held that where a defendant is put on trial and the jury is unable to agree it is not unconstitutional for the accused to be tried again. *United States v. Perez*, 22 U.S. (9 Wheat.) 256 (1824).

In *Wade v. Hunter*, 336 U.S. 684 (1949), this Court stated:

> "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices in which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial, making its completion impossible, such as a failure of a jury to agree on a verdict. In such event that purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again . . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." 336 U.S., at 688-689.

The Court in *Wade* interpreted the rule in *Perez* to mean that a trial could be discontinued when particular circumstances manifested a necessity for doing so, and when failure to discontinue would defeat the ends of justice. 366 U.S., at 690. The Cumberland County Superior Court below found that a mistrial was ordered by the Court in both of the petitioner's two prior trials "after a lengthy and exhausting trial and many hours of deliberation by the jury." The Respondent contends that the "public's interest in justice" requires that the petitioner be tried upon the charge against him after the two previous mistrials.

It has long been the common law rule in this State that double jeopardy does not attach because the trial court has the discretion

to declare a mistrial and require the defendant to be presented before another jury if it be in the interest of justice to do so. *State v. Brock*, 234 N.C. 390 (1951); *State v. Dove*, 222 N.C. 162 (1942); *State v. Guice*, 201 N.C. 761 (1931); *State v. Weaver*, 35 N.C. 203 (1851). The action of the trial court in ordering a mistrial, in the exercise of its discretion, will not support a plea of former jeopardy in a subsequent prosecution. *State v. Battle*, 267 N.C. 513 (1966); *State v. Pfeifer*, 256 N.C. 790 (1966).

"This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will best be served. *Wade v. Hunter*, 336 U.S. 684; *Thompson v. United States*, 155 U.S. 271, 273-274." *Brock v. North Carolina*, 344 U.S. 424, 427 (1953). Also see *Gori v. United States*, 367 U.S. 364 (1961); and *Downum v. United States*, 372 U.S. 734 (1963). In *People v. Bishop*, 238 N.Y.S. 2d 107, 38 Misc. 2d 106 (1962), the defendant had two prior trials on criminal charges result in mistrials by reason of the inability of the jury to agree. The court allowed the case to be sent back for retrial. "When the jury disagreed here, such disagreement was in law no trial at all." 238 N.Y.S. 2d, at 111.

"Just as in the case of a retrial of a defendant after his reversal on appeal of a prior conviction, a trial following a mistrial does not raise the issue of double jeopardy." *United States v. Reeves*, 293 F. Supp. 213, 214 (D.C.D.C. 1968). "(E)ven though the first 'trial' placed defendant in jeopardy, he cannot claim, after a mistrial, that he was placed in double jeopardy by the subsequent proceeding." 293 F. Supp., at 214. Also see *Burris v. Ryan*, 397 F. 2d 553 (1968); *Grogan v. United States*, 394 F. 2d 287 (1967); *Golubin v. United States*, 393 F. 2d 590 (1968); *Oelke v. United States*, 389 F. 2d 668 (1967); *Howard v. United States*, 372 F. 2d 294 (1967).

In the case of *Hernandez v. Nelson*, 293 F. Supp. 682 (1968), the court held that jeopardy did not attach following any of three mistrials in a state prosecution for illegal sale of heroin. And in *State v. Woodring*, 95 Ariz. 84, 386 P. 2d 851 (1963), the court held that when a judge declares a mistrial for failure of the jury to reach a verdict, jeopardy does not attach and "there is no limit to the number of trials but the discretion of the court", 386 P. 2d, at 852, citing *Morgan v. State*, 28 Ariz. 363, 236 P. 112 (1925),

where the defendant was prosecuted for murder after two mistrials. The court found no deprivation of constitutional rights in *United States v. Perisco*, 425 F. 2d 1375 (1970), when the defendants were tried a fifth time after four previous trials for the same offense.

Being brought to trial after two previous mistrials is not such an overreaching and oppressive prosecution that the courts should prohibit. The petitioner attempts to draw a line between one and two mistrials, alleging that a defendant might be retried after one mistrial but not after two mistrials. Such a rigid demarcation is not possible. A particular number of trials for the same offense does not necessarily result in deprivation of the defendant's constitutional rights. This decision has first been made by the trial court. The Respondent contends that on the record in the present case the petitioner has failed to show any abuse of discretion in the trial judge's ruling.

CONCLUSION

The Respondent respectfully requests that for the above reasons that the petition for writ of certiorari be denied.

Respectfully submitted,

ROBERT MORGAN
Attorney General of
North Carolina

JACOB L. SAFRON
Assistant Attorney General
A Member of the Bar of the
Supreme Court of the United States

EDWARD L. EATMAN, JR.
Assistant Attorney General

Counsel for the State of
North Carolina, Respondent

Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone (919) 829-7188